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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1954.

No. .....

FREEDA CAROLINE MILLER, also known as FREEDA MILLER, APPELLANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; THE DISTRICT COURT OF ADAMS COUNTY, and CHRISTIAN D. STONER, one of the Judges thereof, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rules 13 and 15 of the Supreme Court of the United States, the above named appellant files this, her jurisdictional statement:

DECISION APPEALED FROM.

(a) The decision of the Colorado Supreme Court which is appealed from is reported as *Miller v. Public Service Company of Colorado, et al*, 272 Pac.(2d) 283. It has not yet been reported in the official reports. A copy of the opinion of the court is attached hereto as Appendix A.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED.

(b) Jurisdiction of the United States Supreme Court is invoked on the following grounds:

Nature of Proceedings.

(i) This proceeding was instituted in the Supreme Court of Colorado to obtain a Writ of Prohibition* directed to the District Court of the State of Colorado in and for the County of Adams to restrain that court from proceeding in an action instituted by the appelice Public Service Company of Colorado to condemn real property owned by the appellant. The said action in eminent domain was brought pursuant to section 52, Chapter 61, 1935 Colorado Statutes Annotated, as amended by Chapter 41, 1952 Session Laws of Colorado.

Date of Judgment.

(ii) The judgment sought to be reviewed was rendered on June 14, 1954, and became final and was entered on July 19, 1954, a copy of which is attached hereto as Appendix B and C.

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*The Colorado Rules of Civil Procedure do not provide for the issuance of a Writ of Prohibition as such. Rule 106 of the Colorado Rules of Civil Procedure provides as follows:

"Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished. In the following cases relief may be obtained by appropriate action or by an appropriate motion under the practice prescribed in these rules:

"(4) Where an inferior tribunal (whether court, board, commission or officer) exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy. Upon the filing of the complaint the court shall direct the issuance of a citation to the inferior tribunal to show cause why the relief requested shall not be allowed. If the complaint is supported by an affidavit the order to show cause may be issued, or the court may forthwith order the inferior tribunal, or any person having custody of the records of the proceedings described in the complaint, to certify to the court at a specified time and place a transcript of the records and proceedings, or such portion thereof as the court may direct. If a stay of proceedings is granted the citation or order shall so state. Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion."

Statutory Provision Conferring Jurisdiction to Entertain This Appeal.

(iii) The statutory provision believed to sustain the appellate jurisdiction of this Court is Title 28, United States Code, Sec. 1257 (2) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Cases Sustaining Jurisdiction of This Court.

(iv) Cases believed to sustain the jurisdiction of this Court to entertain this appeal are: *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 36 S.Ct. 234, 60 L.Ed. 507; *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549, 585, 67 S.Ct. 1409, 91 L.Ed. 1666; *Dandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 52 S.Ct. 103, 76 L.Ed. 136; *Michigan Central Co. v. Mix*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470; *Madruga v. Superior Court*, 346 U.S. 556, 74 S.Ct. 298; *Hammerstein v. Superior Court*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135.

Text of Statute Which Is Challenged.

(v) The text of the statute, the validity of which is challenged, is as follows:

> "Section 1. Section 52, Chapter 61, 1935 Colorado Statutes Annotated, is hereby amended to read as follows:
>
> "Section 52. *Companies That May Condemn Real Estate, Rights of Way, Easements or Other Rights.* If any corporation formed for the purpose

of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate, or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated.

"Section 2. This Act shall be in force and effect after December 15, 1952." (Ch. 41, 1952 Session Laws of Colorado).

QUESTIONS PRESENTED BY THIS APPEAL.

(c) The questions presented by this appeal are:

1. Whether Section 52, Chapter 61, 1935 Colorado Statutes Annotated as amended by 1952 Session Laws which grants to corporate public utilities the right to condemn private property but denying such right to a non-corporate public utility, is repugnant to the 14th Amendment of the Constitution of the United States, in that it constitutes a denial of the equal protection of the laws.

2. Whether Section 52, Chapter 61, 1935 Colorado Statutes Annotated as amended by 1952 Session Laws which grants the right to corporate public utilities to condemn private property is repugnant to the 14th Amendment to the Constitution of the United States, in that it permits private corporations to condemn property for private use in violation of the due process of law clause of the 14th Amendment.

STATEMENT OF THE CASE.

(d) The appellee Public Service Company of Colorado is a private Colorado corporation engaged in the production and sale of gas and electricity for profit in the State of Colorado.

The appellant is the owner of a dairy farm located in Adams County, Colorado, consisting of 91.53 acres of land in said county.

Appellee Public Service Company of Colorado brought an action in the Colorado District Court in and for the County of Adams to condemn appellant's said real property for the alleged purpose of constructing an electric generating plant on said land.

The said appellee has not obtained any certificate of necessity from the Colorado Public Utilities Commission as required by Colorado law (sec. 36, ch. 137, 1935 Colorado Statutes Annotated).

After the commencement of the said action in the District Court, appellant filed an original proceeding in the Supreme Court of Colorado in the nature of prohibition, seeking a writ to prohibit and restrain the said District Court from proceeding in the said condemnation action on the grounds, *inter alia* that the statute relied upon by the said appellee was repugnant to the 14th Amendment to the Constitution of the United States in that it denies to persons within the jurisdiction of the State of Colorado the equal protection of the laws, contrary to the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States and for the further reason that, the said statute permits the appellee Public Service Company of Colorado to condemn property for a private use and purpose, and thereby deprives appellant of her property without due process of law, contrary to the provisions of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States.

On the 22nd day of April, 1954, the Supreme Court of Colorado issued a rule to show cause why the proceeding in the District Court should not be prohibited.

After the parties had filed briefs, and the Court had taken the matter under consideration, the Supreme Court of Colorado discharged the rule to show cause, and denied appellant's prayer for a writ of prohibition, which decision and judgment is the subject of this appeal.

Manner in Which Federal Questions Were Raised in State Court.

The constitutional questions presented were raised by appellant in the Supreme Court of Colorado by Paragraph A(c) of the Specification of Points contained in her complaint filed in the Supreme Court of Colorado.

The Colorado Supreme Court passed upon the constitutional issues presented in its decision denying appellant's prayer for a writ of prohibition (272 Pac. (2) 283):

See pages 12-14 of the Appendix A attached hereto.

GROUNDS FOR CONTENDING FEDERAL QUESTIONS ARE SUBSTANTIAL.

(e) The federal questions presented by this appeal are substantial, in that:

1. The decision and judgment of the Colorado Supreme Court discharging its rule to show cause, and denying the relief prayed for by appellant, constituted a final judgment of the highest court of the State of Colorado upholding the validity of a statute of the State of Colorado as against appellant's claim of its invalidity on the ground of being repugnant to the Constitution of the United States.

2. The equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires equality of privileges, rights and advantages to all

persons within the jurisdiction of the state. *State of Missouri, ex rel Gaines v. Canada*, 305 U.S. 337, 59 S.Ct. 232.

3. The equal protection of the laws is a basic constitutional right and the denial thereof by a state legislature raises a substantial federal issue. *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536.

4. Expropriation of private property for a private use constitutes a taking of property without due process of law, contrary to the Fourteenth Amendment, and the determination of whether the proposed use is public or private is a judicial question. *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S. Ct. 360.

5. This Court held in *Milheim v. Moffat Tunnel Improvement District*, 262 U.S. 710, 43 S.Ct. 694, that: "The nature of a use, whether public or private, is ultimately a judicial question" (262 U.S. 717), and that "The federal question presented, being one which requires analysis and exposition for its decision is not frivolous, and the motion to dismiss the Writ of Error is accordingly denied" (262 U.S. 716, 717).

Respectfully submitted,

HARRY A. FEDER,
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JACOB L. SHERMAN,
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Denver 2, Colo.,

Attorneys for Appellant.

APPENDIX A

FREEDA CAROLINE MILLER, also known as FREEDA MILLER,

Complainant,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a Corporation; THE DISTRICT COURT OF ADAMS COUNTY; and CHRISTIAN D. STONER, one of the Judges thereof,

Respondents.

No. 17426.

June 14, 1954.

ORIGINAL PROCEEDING.

EN BANC.

RULE TO SHOW CAUSE DISCHARGED.

Messrs. Jacob L. Sherman, Harry A. Feder, Milton Morris, Attorneys for Complainant.

Messrs. Lee, Bryans, Kelly and Stansfield, Fred M. Winner, William W. Gaunt, Attorneys for Respondents.

Mr. Justice Holland delivered the opinion of the Court.

The principal question here presented is that of the right of the Public Service Company of Colorado, a utility corporation, to proceed under the Eminent Domain Statute, as amended.

December 14, 1953, the utility company filed its petition in eminent domain in the District Court of Adams county, seeking to condemn 91.53 acres of land situated at 62nd and York streets in Adams county for the purpose of constructing a new electric generating plant in order to meet the present and future requirements for service of electric power to its customers. It further is alleged in the petition that the premises are presently devoted to agricultural purposes and not to any public use and that the company had been unable to reach an agreement with

the property owner, herein called respondent, with respect to compensation for the property; and further that it was proceeding under the authority of section 52, chapter 61, '35 C.S.A., as amended in 1952, effective after December 15, 1952. The respondent property owner filed five motions to this petition, namely, motion to determine necessity, motion for judicial ascertainment of public use, request for jury trial, motion to dismiss and an additional motion to dismiss.

The motion to determine necessity was for the appointment of a commission to determine such necessity. The motion for judicial ascertainment for a public use was to the effect that the court make a judicial ascertainment as to the public use of the land described in the petition; the two motions to dismiss were on the grounds that the petition did not state a claim upon which relief could be granted; that the sections of the statutes, supra, relied upon, are unconstitutional; and finally, that the district court was without jurisdiction over the person and the subject matter of the action.

The two motions to dismiss were argued and denied and on the motion for judicial ascertainment for public use the court made a finding that the property sought to be condemned was for a public use.

Respondent, having obtained a stay of execution in all proceedings, filed her complaint in our Court under Rule 106, R.C.P. Colo., for a review of the orders of the trial court, and for an order against the trial court and petitioner to show cause why the relief requested in the petition should not be allowed. Our Court on April 22, 1954, issued its rule to show cause and entered a stay of execution. Answer and return having been filed, the matter is at issue and petitioner presents the following contentions as reasons for reversal or to make the rule absolute, namely:

1. That it is not alleged in the petition that the util-

ity company had a certificate of necessity and permission from the Public Utilities Commission to construct a new electric generating plant.

2. That there is no allegation that the proposed plant and location had been approved by the Planning Commission of Adams County.

3. That sec. 52, c. 61, '35 C.S.A., as amended, is unconstitutional because of class legislation and is contrary to Article V, sec. 25 of the Colorado Constitution and of the Fourteenth Amendment to the federal Constitution, and as amended violates Article II, section 14 of the Colorado State Constitution.

4. That the land sought to be condemned is now devoted to public use and cannot be taken for another public use without showing greater need or necessity.

It further is contended by respondent, now petitioner in the present proceedings, that the obtaining of a certificate of necessity from the Public Utilities Commission is a prerequisite to a condemnation proceeding as well as the obtaining of permission for construction and location by the proper authority of Adams county.

From our study and consideration of the contentions of petitioner, respondent below, it appears that such are in conflict with the well-settled law of eminent domain in this state.

On the question of its being necessary to first obtain a certificate of public convenience and necessity before seeking condemnation, the statute apparently relied upon, section 36, chapter 137, '35 C.S.A., does not contain such requirement. The pertinent part of the statute is, "No public utility shall henceforth begin the *construction of a new facility*, plant or system, or of any extension of its facility, plant or system, without first having obtained from the commission a certificate * * *." (Emphasis supplied.) Thus it appears that such certificate is not necessary for

the purpose of condemnation and relates solely to the question of use after the property has been acquired by condemnation. It is difficult to conceive how the utility could logically pr ceed in obtaining the certificate of convenience and necessity as to the particular land or property involved before it had acquired the right to use the land or obtained title thereto by condemnation. The so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; and has no relationship whatever with the matter of condemnation. This being true, such an allegation of which complaint is made here, is not necessary.

In the matter of the necessity of the approval of the Planning Commission of Adams county, the jurisdiction of Colorado courts over eminent domain proceedings is not affected by the lack of such an allegation in the petition for condemnation that such approval has been obtained, and it is not necessary as a condition precedent to eminent domain. However, in this instance, it is shown by respondent-petitioner's own witness, Building Inspector of Adams county, testifying at the arguments of the motions to dismiss, that the property here involved is already zoned for industrial purposes and, upon identification of the zoning resolutions, the same were admitted in evidence which show a resolution providing that Industrial One District permits the following use, "light or power plant, central station". Therefore, where the contemplated use falls within a zone already established, there would be no need for obtaining the approval of the Planning Commission if such was at all necessary. It is obvious that it would be impossible for the utility to submit to such Planning Commission the extent and exact location of the property involved, which it might never be able to obtain, and at least it would be premature; moreover, the extent and exact location as referred to in the statute, section 9, chapter 45A, '35 C.S.A., could not be determined in emi-

nent domain proceedings until the question of necessity has been decided.

Respondent-petitioner, an individual property owner, has not shown herself to be one of a class affected by her claim that the statute under which the utility is now proceeding to condemn her property is class legislation. If the statute here questioned as being unconstitutional can be said to be class legislation, it is because all businesses specified in the statute are not equally protected. The statute specifies who may condemn private property and respondent-petitioner does not fall within the class of persons so specified. The amended statute, section 1, chapter 41, S.L. '52, here involved and under which the utility is proceeding and which became effective December 15, 1952, is as follows:

> "If any corporation formed for the purpose of constructing a road, ditch, reservoir, pipe line, bridge, ferry, tunnel, telegraph line, railroad line, electric line or electric plants, shall be unable to agree with the owner, for the purchase of any real estate or right of way or easement or other right necessary or required for the purpose of any such corporation, for transacting its business, or for any lawful purpose connected with the operations of the company, such corporation may acquire title to such real estate or right of way, or easement or other right, in the manner provided by law for the condemnation of real estate, or right of way; and any ditch, reservoir, or pipe line company may, in the same manner, condemn and acquire the right to take and use any water not previously appropriated."

It is abundantly clear that the above section of the statute provides that a corporation, such as the petitioner here, may institute condemnation proceedings for the construction of an electric plant as here involved. Prior to the effective date of this amendment, December 15,

1952, no such authority existed under the old statute and this was fully determined in the case of *Potashnik v. Public Service Company of Colorado*, 126 Colo. 98, 247 P. (2d) 137, decided July 14, 1952. If respondent, now complainant, could approvingly be heard on her contentions that the Act, as amended, is uncontitutional as being class legislation, it is well to note that she apparently has overlooked the fact that the language of the Act, upon which she bases her contention, has remained the same for many years and has been upheld by this Court on several occasions, one of the latest being *Pine Martin Mining Co. v. Empire Zinc Co.*, 90 Colo. 529, 11 P. (2d) 221. It is herein contended that because the statute gives corporations engaged in certain kinds of business the right to condemn, while an individual so engaged is denied that right, therefore he is deprived of equal protection of the law and results in class legislation. This classification was not added to the eminent domain statutes by this recently amended section. The section expressly designates the type of corporation that may avail itself of the right to condemn and such right is strictly confined to certain enumerated corporations. Only such corporations or individuals as might be adversely affected, are entitled to assail the constitutionality of such a statute. *Rinn v. Bedford*, 102 Colo. 475, 84 P. (2d) 827.

We believe the question of the constitutionality of this statute, as it may or may not relate to individuals, is clearly settled by the language of Mr. Justice Clark in the case of *Potashnik v. Public Service Co. of Colorado, supra*, as follows:

> "Statutes granting to certain types of corporations, of which the Company is one, the right to exercise the powers of eminent domain, and charter provisions of such corporations to enable them to take advantage of this privilege, grant no power in

addition to that accorded by the specific provisions of the general law covering that subject, and are designed only to give to those particular corporations the same rights under the eminent-domain provisions as might be exercised by an individual under the same circumstances."

Throughout our entire eminent domain statutes we find the classification of corporations and individuals. If such classification is reasonable and operates with the same effect upon all members of the class involved, then it is within the power of the legislature to make such classification. We find no denial of the right of individuals that may engage in the utility business to equal protection of the law.

The question raised as to whether the contemplated use to be made of the property involved, was a public use, could not be raised by the motion to dismiss. In the condemnation petition it was specifically alleged that the use was public, and respondents in the motion to dismiss, admitted this well pleaded fact; it is, therefore, not properly before us in this proceeding and can only properly be presented here by way of an answer. In fact, the use of the property here contemplated, cannot be said to be other than a public use since the operation of the plant in the furtherance of the conduct of the utility business is for service to the public, and is a business conducted for a public purpose. Complainant contends that the land is already devoted to a public use, because the City of Denver has rights of way for water ditches across the property and, therefore, that portion of the land is devoted to a public use. The City of Denver is not a party to this action and if such right of way does exist, Denver's right would not be affected by this action because it is not made a party. Respondent here is in no position to complain that others who might have an interest in the property are not made parties, because she alone is affected by the outcome of this action, and not

others she claims may have an interest, and the omission of any party will not invalidate the proceedings as against her.

It being abundantly clear that the amended statute does not offend against either the state or federal Constitution, and that it specifically authorizes a corporation, such as is here involved, to proceed in condemnation of land for the purposes indicated by its pleading, and that respondent's objections to the proceeding are without legal foundation and are contrary to the law and decisions of this Court, the rule to show cause herein must be, and is, discharged in order that the proceedings as instituted in the trial court may go forward.

APPENDIX B.

That thereupon and on the aforesaid fourteenth day of June, A. D. 1954, the following judgment and order discharging rule to show cause was made and entered, to-wit:

Original Proceeding.

No. 17426.

Freeda Caroline Miller, also known as Freeda Miller, COMPLAINANT.

vs.

Public Service Company of Colorado, a corporation; The District Court of Adams County; and Christian D. Stoner, RESPONDENTS.

Upon consideration of the Rule to Show Cause heretofore issued, as well as the answer and reply thereto, the

Court being sufficiently advised, doth, in a written opinion, order that the Rule to Show Cause heretofore issued herein be, and the same hereby is, discharged, set aside and held for naught.

APPENDIX C.

That thereafter, and on, to-wit: the nineteenth day of July, A. D. 1954, the court denied rehearing in said cause; that the order denying rehearing is in words and figures as follows, to-wit:

Original Proceeding.

No. 17426.

Freeda Caroline Miller, also known as Freeda Miller, COMPLAINANT.

VS.

Public Service Company of Colorado, a corporation; The District Court of Adams County; and Christian D. Stoner, RESPONDENTS.

Upon consideration of the motion of the complainant for a rehearing in this cause, the Court being sufficiently advised in the premises, doth this day order that said motion be, and the same hereby is, denied.